SUNGEI RINCHING SDN. BHD.

v.

SRI KELUARGA SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
DATO' N.H. CHAN JCA
DATO' ABU MANSOR ALI JCA
DATO' ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO. W-02-95-95]
19 APRIL 1996

COMPANY LAW: *Winding up - Notice of demand - Validity - Amount of sum owed not in dispute - Amount demanded was same amount as in the judgment - Amount of costs not specified in demand letter - Whether there was due compliance with s. 218(2)(a) Companies Act 1965 - Debtor's conduct - Delibrate neglect to pay debt for nearly 2 years - Effect.*

On 28 October 1993 the respondent obtained a summary judgment against the appellant for RM203,780.87 together with interest and costs. The appellant appealed to the Supreme Court whereupon on 1 March 1994 the superior Court affirmed the judgment and dismissed the appeal. Thereafter, on 4 March 1994, the respondent issued a notice of demand to the appellant demanding the sums due under the judgment together with interest and costs. The demand however did not specify the amount of costs payable by the appellant. The appellant failed to pay up, and on 7 December 1994 the learned Judge ordered a winding up following a petition therefor by the respondent.

In this appeal the appellant sought to oppose the petition by challenging the validity of the notice of demand on the grounds, firstly, that the said notice was defective as the sum of RM203,780.87 in the body of the demand included an element of continuing interest not stipulated, and secondly, that in the absence of a valid notice there could be no evidence of insolvency.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] In this case the sum demanded was the same amount as in the original judgment. There was thus no dispute as to the sum owed and the appellant was clearly not in no way misled in that respect. In the circumstances this Court could only uphold the respondent's contention that the demand was valid since the sum and interest could easily be ascertained. Although the amount of costs was not mentioned it was explained by the fact that it could not then be ascertained because of the appeal.

[2] This Court took particular note that the appellant's appeal was dismissed by the Supreme Court on 1 March 1994 and for nearly two years the appellant never did anything to settle their debt. In view of the valid notice of demand, such conduct could be interpreted as the appellant's inability to pay their debt.

[Appeal dismissed. Winding up order affirmed]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG SYARIKAT:** Penggulungan - Notis Tuntutan - Keesahan - Jumlah yang terhutang tidak dipertikaikan - Jumlah yang dituntut adalah sama sepertimana yang terdapat dalam penghakiman - Jumlah kos tidak ditetapkan dalam surat tuntutan - Samada s. 218(2)(a) Akta Syarikat 1965 telah dipatuhi - Tingkah laku penanggung hutang - Kecuaian membayar hutang selama hampir 2 tahun yang disengajakan - Kesan.*

Pada 28 Oktober 1993 responden telah mendapatkan penghakiman terus terhadap perayu bagi jumlah sebanyak RM203,780.87 bersama-sama faedah dan kos. Perayu telah merayu kepada Mahkamah Agung di mana pada 1 Mac 1994 Mahkamah Agung tersebut telah mengikrarkan penghakiman tersebut dan menolak rayuan. Selepas itu, pada 4 Mac 1994, responden telah mengeluarkan notis tuntutan kepada perayu menuntut jumlah yang kena dibayar di bawah penghakiman tersebut bersama-sama faedah dan kos. Tuntutan berkenaan namun begitu tidak menentukan jumlah kos yang kena dibayar oleh perayu. Perayu telah gagal untuk membayarnya, dan pada 7 Disember 1994, Hakim yang bijaksana telah memerintahkan penggulungan berikutan dengan satu petisyen untuknya oleh responden.

Dalam rayuan ini perayu telah berusaha untuk membantah petisyen tersebut dengan mencabar keesahan notis tuntutan atas alasan, pertamanya, bahawa notis tersebut tidak sempurna kerana jumlah sebanyak RM203,780.87 dalam bentuk tuntutan utama adalah termasuk unsur faedah berterusan yang tidak ditentukan, dan keduanya, bahawa dalam ketiadaan notis yang sah tidak mungkin terdapat keterangan ketaksolvenan.

Diputuskan:

Oleh Abu Mansor Ali, HMR (menyampaikan penghakiman Mahkamah):

[1] Dalam kes ini jumlah yang dituntut adalah jumlah yang sama dengan penghakiman asal. Dengan itu tidak terdapat pertikaian berhubung dengan jumlah yang terhutang dan perayu jelas tidak dikelirukan berhubung dengannya. Dalam keadaan sedemikian, Mahkamah ini hanya boleh mempertahankan penegasan responden bahawa tuntutan tersebut adalah sah

oleh kerana jumlah dan faedahnya boleh ditentukan dengan mudah. Walaupun jumlah kos tidak disebut, ianya telah diterangkan melalui fakta bahawa ianya tidak dapat ditentukan kerana rayuan tersebut.

[2] Mahkamah ini mengambil perhatian yang khusus bahawa rayuan perayu telah ditolak oleh Mahkamah Agung pada 1 Mac 1994 dan selama hampir dua tahun perayu tidak pernah melakukan apa-apa untuk menyelesaikan hutang mereka. Memandangkan notis tuntutan disini sah, perlakuan yang sedemikian boleh ditafsirkan sebagai ketidak-upayaan perayu untuk membayar hutang mereka.

[Rayuan ditolak. Perintah penggulungan diikrarkan]

Cases referred to:
Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd. [1992] 1 MLJ 313 ***(dist)***
Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd. & Another Appeal [1991] 1 MLJ 426 ***(refd)***
Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 2 MLJ 447 ***(refd)***
Re Tweeds Garages Ltd. [1962] 1 Ch. D, 406 ***(foll)***

Legislation referred to:
Companies Act 1965 s. 218(2)(a)

For the appellant - Chandrasekar a/l K. Kandasamy; M/s. Nik Hussain & Partners
For the respondent - R. Siva Dharma; M/s. Siva Dharma & Assoc.

JUDGMENT

Abu Mansor Ali JCA:

We dismissed this appeal with costs to the respondent on 12 December 1995 after hearing full arguments and we now give our reasons for our judgment.

The undisputed facts of this appeal are as follows. The respondent obtained summary judgment on the 28 October 1993 against the appellant in High Court Kuala Lumpur vide suit No. D1-22-176-92 for the sum of RM203,780.87 together with interest thereon at the rate of 8% per annum from 28 October 1993 till the date of realisation and costs ("the said judgment").

The said judgment arose from a debt due from the appellant to the respondent for goods sold and delivered on a running account basis from May 1990.

Subsequently, the appellant appealed to the Supreme Court vide Mahkamah Agung Rayuan Sivil No. 02-647-93 and the appeal was dismissed on 1 March 1994.

The respondent issued a notice of demand dated 4 March 1994 ("the notice of demand") to the appellant demanding for the sums due under the said judgment.

The appellant did not respond to the notice of demand within the time prescribed and the respondent took out a winding up petition against the appellant on 30 August 1994.

Mr. Chandrasekar for the appellant raised two grounds:

(a) that the Notice of Demand under s. 218(2)(a) of the Companies Act 1965 was defective; and

(b) in the absence of a valid notice, there was therefore no evidence of insolvency.

He submitted the said notice read as follows:

Statutory Demand Pursuant To s. 218 Of The Companies Act, 1965 (Act 125) For Payment Of A Debt

To:

Sungei Rinching Sdn. Bhd.
11-2, Jalan 1/57A,
Batu 3, Jalan Ipoh,
51200 Kuala Lumpur.

Take Notice that Sri Keluarga Sdn. Bhd. being a company to which the said Sungei Rinching Sdn. Bhd. is indebted in a sum exceeding Ringgit Five Hundred (RM500), namely in the sum of Ringgit Two Hundred and Three Thousand and Seven Hundred Eighty and Sen Eighty Seven (RM203,780.87) only together with interest thereon at the rate of 8% per annum from the 28th day of October 1993 to the date of final payment and costs requires the said Sungei Rinching Sdn. Bhd. to pay to it, the said Sri Keluarga Sdn. Bhd., or to secure or compound to its reasonable satisfaction the sum of RM203,780.87 together with interest thereon at the rate of 8% per annum from the 28th day of October 1993 to the date of final payment and costs being the amount due and owing in respect of a judgment obtained against you in proceedings known as Kuala Lumpur High Court Suit No. D1-22-176-92, full particulars whereof have already been supplied **And Take Further Notice** that if at the expiration of twenty-one (21) days from the date of service hereof, the said Sungei Rinching Sdn. Bhd., will pursuant to s. 218(2) of the Companies Act be deemed to be unable to pay its debts as and when they fall due and proceedings may thereafter be commenced to wind up the said Sungei Rinching Sdn. Bhd. pursuant to the Companies Act.

Dated the 4th day of March 1994

Signed on behalf of Sri Keluarga Sdn. Bhd. by its lawfully authorised agent and solicitor.

t.t

Messrs Siva Dharma & Associates
Solicitors for Sri Keluarga Sdn. Bhd.

Learned Counsel for the appellant further submitted that the notice was defective as the sum of RM203,780.87 in the body of the said demand included an element of continuing interest not stipulated and this together with interest thereon at the rate of 8% per annum from the 28 October 1993 to the date of final payment rendered the notice of demand invalid.

He relied on the Supreme Court case of *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1992] 1 MLJ 313 @ 317 where his Lordship Gunn Chit Tuan SCJ (as he then was) cited with approval his Lordship Dr. Zakaria J's judgment in *Re Perusahaan Jenwatt Sdn. Bhd.* in which Zakaria J (as he then was) held, *inter alia*, that the notice of demand must comply strictly with the requirements of s. 218(2)(a) of the Companies Act 1965 because the amount stated in the said notice was far in excess of the debt due and the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts.

Counsel for the appellant also submitted that it is for the creditor to state the amount of demand correctly and not for the debtor to make enquiries.

In support of his appeal, he also cited the case of *Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd. & Another Appeal* [1991] 1 MLJ 426 where the Supreme Court held that the notice of demand was void *ab initio* where it stated:

> Payment within seven days of 'the sum of $612,065.07 together at the agreed rate of 13.25% p.a as from 31 October 1984 to date of realization and $300 costs'.

He had submitted that, equally in our present appeal, the demand was erroneous and the demand cannot therefore be valid.

In reply, Mr. Siva Dharma for the respondent contended that the debt of the appellant was created in May 1970. Proceedings to claim back the goods was commenced in the High Court Kuala Lumpur in January 1992 and summary judgment was obtained on 28 October 1993. The appeal on the summary judgment for the sum of $203,780.87 went on appeal to the Supreme Court on 1 March 1994 and the appeal was dismissed. Thereafter the respondent commenced execution after 1 March 1994 by sending the said notice of demand.

When the respondent was not paid they filed a petition for winding up on 30 August 1994 on 7 December 1994 the learned Judge ordered a winding up.

Learned Counsel for the respondent referred to the original judgment in this case (see page 41 of the Appeal Record) where the judgment is stated to be for RM203,780.87 and this was the judgment that was affirmed by the Supreme Court. He submitted that the same amount in the original judgment in the High Court has been demanded in the notice of demand sent to the appellant. He further submitted that the *Sri Hartamas* case cited by the Counsel for the

appellant was distinguishable in that the appellant was in no way misled as to the amount. We upheld the respondent's Counsel's contention that the demand was valid since the sum and interest could easily be ascertained although the amount of the costs was not mentioned since it could not be ascertained at that stage because of the appeal.

The respondent's Counsel cited *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* [1988] 2 MLJ 447 where at page 448 Salleh Abas L.P held:

> In our judgment, as the debt of $60,580 is not disputed the respondent company is caught under s. 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made, the respondent company can still defend on the balance amount in dispute.

We took particular note that the appellant's appeal was dismissed by the Supreme Court on 1 March 1994 and for nearly two years the appellant never did anything to settle their debt; such conduct could, therefore, be interpreted as the appellant's inability to pay their debt having held that the demand was a valid demand.

We are fortified in the view we took by the judgment in *In re Tweeds Garages Ltd.* [1962] 1 Ch. D page 406 (not cited to us) where at page 413 his Lordship Plowman J in considering whether to order that an insolvent company be wound up held:

> From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine *bona fide* dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: "It is not disputed that you are a creditor but "the amount of your debt is disputed and you are not, therefore, "entitled to an order"? I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.

In view of our decision on the first ground that the notice of demand was valid, we find that the appellant's second ground was devoid of any merit. We therefore, held that the learned trial Judge was correct in his finding that the appellant was unable to pay its debts and the appellant should be wound up. We dismissed the appeal with costs to the respondent.

Reported by W.A. Sharif